THE DEVELOPMENT OF JURISPRUDENCE DURING THE PAST CENTURY.[1]

THE term "jurisprudence" has been used with so many meanings, and each meaning is so vague, that it is necessary at the outset of any discussion of it to limit in some way the meaning intended to be put upon it. By jurisprudence, as used in the programme of this Congress, I understand to be meant the whole body of law of the European and American nations, regarded as a philosophical system or systems; in short, the science of justice, as practised in civilized nations. My own topic, therefore, is to describe the changes in the law or in the understanding of the law in the civilized world during the past century.

So broad a subject cannot, of course, be treated exhaustively, nor can any part of it be examined in detail. My effort will be merely to suggest, in case of a few branches of law where the changes seem to be typical, the course and reason of those changes.

If we compare the condition of the law at the beginning of the century with its present condition, we shall gain some idea of the amount of change in the law itself and its administration. In England conservatism and privilege and the dread inspired in the heart of the people by the excesses of the French revolution conspired to retain in the law the medieval subtleties and crudities, though the reason of them had been forgotten and the true application of them often mistaken. The criminal law was administered with ferocity tempered by ignorance; all the anomalies and mistakes which have disfigured its logical perfection are traceable to the period just before the beginning of the last century. Criminal procedure was still crude and cruel. The accused could neither testify nor be assisted by counsel; legally, death, actually, a small fine or at most transportation, was the punishment for most serious offenses. The amount of crime in proportion to the population was enormously greater than now; there were no preven-

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tive measures, no police, not even street lights. The law of torts occupied almost as small a place as it did in the proposed codes; the law of contracts was so unformed that it was not certain whether Lord Mansfield's doctrine that a written commercial agreement needed no consideration, would prevail or not. Business corporations were hardly known; almost the whole field of equity was hidden by a portentous cloud. Lord Eldon had just become chancellor. What the law of England was, such with little difference was the law of our own country. Its application to the complex life of the present was not dreamed of; and it had to be greatly changed before it could be adapted to the needs of to-day. Yet to say, as did Bentham, that it was rotten to the core and incapable of amendment was grotesquely incorrect; to say, as one of his latest disciples did, that it was the laughing-stock of the Continental nations is strangely to misread history. In 1803, with all its imperfections and crudities, it was probably the most just and humane system of law under which human beings were then living.

On the Continent, feudal rights characterized civil law; torture was the basis of the administration of criminal law. And in no country of any size had the people yet obtained what had been given to Englishmen by their greatest king more than six hundred years before, — a common law. Each province throughout southern and western Europe had its custom, each land-owner his own jurisdiction. The rigor of the criminal law had been somewhat modified in France by the legislation of the revolution, and just at the beginning of our century the Civil Code, first of the French Codes, was adopted. These codes, temporarily or permanently impressed on a large part of Europe outside of France, constituted the beginning of modern legislative reform.

The spirit of the time molds and shapes its law, as it molds and shapes its manner of thought and the whole current of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man's conception of right changes from age to age, as his knowledge grows. The spirit of the age, therefore, affecting as it must man's conception of right, affects the growth both of the common and of the statute law. But the progress toward ideal right is not along a straight line. The storms of ignorance and passion blow strong, and the ship of progress must beat against the wind. Each successive tack brings us nearer the ideal, yet each seems a more or less abrupt departure

from the preceding course. The radicals of one period become the conservatives of the next, and are sure that the change is a retrogression; but the experience of the past assures us that it is progress.

Two such changes have come in the last century. The eighteenth had been, on the whole, a self-sufficient century; the leaders of thought were usually content with the world as it was, and their ideal was a classical one. The prophets of individuality were few and little heeded. But at the end of the century, following the American and French revolutions, an abrupt change came over the prevailing current of thought throughout the civilized world; and, at the beginning of the period under discussion, the rights of man and of nations become subjects not merely of theoretical discussion but of political action. The age became one of daring speculation. Precedent received scant consideration. The American revolution had established the right of the common people to a voice in the government. The French revolution had swept feudal rights from the civilized world. Although the French Republic was just passing into the French Empire, it was an empire which belonged to the people, and one of which they were proud. The Emperor was the representative and the idol, not of an aristocracy, but of his peasants and his common soldiers. The dreams of Napoleon himself, to be sure, were not of an individualistic paradise, where each man's personality should have free play and restraint on his inclinations be reduced to the minimum; but so far as he was able to put his centralizing ideals into execution he raised but a temporary dam, which first spread the flood of liberty over all Europe and was finally swept away by the force of the current.

Starting from this point, the spirit of the time for more than a generation was humanitarian and individualistic. In political affairs independence was attempted by almost every subordinate people in the civilized world, and was attained by the South American colonies, by Greece, and by Belgium. In religion freethinking prevailed, and every creed was on the defensive. In society women and children were emancipated. Slavery was abolished, and the prisons were reformed. It was a destructive rather than a constructive age, and its thinkers were iconoclasts.

But a change, beginning with the second third of the century, was gradually accomplished. The application of the forces of steam and electricity to manufacture and transportation has had a greater effect on human life and thought than any other event

of modern times. The enormous power exerted by these forces required great collections of labor and capital to make them effective. Association became the rule in business affairs, and as it proved effectual there, the principle of association became more and more readily accepted in social and political affairs, until it has finally become the dominating idea of the time. The balance has swung; the men of our time are more interested in the rights of men than in the rights of man; the whole has come to be regarded as of more value than the separate parts. Beginning with the construction of railroads, the idea attained a firm standing in politics in the sixties. Whereas before that time the movement had been toward separation, now it was toward consolidation. People felt the tie of nationality stronger than the aspiration for individual development. The unification of Italy and of Germany, the federation of Canada, the prevalence of corporate feeling in America which, first passionately expressed by Webster, prevailed in '65, mark the principle of association in political affairs. In business the great combinations of capital have been the salient features of the change.

Professor Dicey, in a most suggestive series of lectures a few years ago, pointed out many ways in which the English law had been affected by this progress of thought during the nineteenth century. Since the thought of the whole world has been similarly affected we should expect to find, and we do find, that not merely English law but universal jurisprudence has developed in the direction of the progress of thought, — during the first period in the direction of strengthening and preserving individual rights, both of small states and of individuals, during the second period in the direction of creating, recognizing, and regulating great combinations, whether of states or of individuals. Let us develop this line of thought by examining the progress of law in a few striking particulars.

The most striking development of the law of nations during the last century has been in the direction of international constitutional law, if I may so call it, rather than of the substantive private law of nations. At the beginning of the period the fundamental doctrine of international law was the equality of all states great or small, and this idea, as one might expect, was fully recognized and insisted on during the first fifty years of the century. There was little development in the law otherwise. Each nation adopted and enforced its own idea of national rights, and was powerless to

force its ideas upon other nations. When, at the beginning of the century, France set up her absurd notions of her own national rights, other nations were powerless to restrain or to teach her. There was no international legislature or court, no method of declaring or of developing the law of nations. Each state was a law to itself, giving little more than lip service to a vague body of rather generally accepted principles. The alliance to conquer Napoleon, to be sure, brought several great nations into a common undertaking; but this alliance, while of political importance, added nothing to the growth of the law.

In the last half of the century, however, there has been an enormous development of combinations, both to affect and to enforce law; and resulting therefrom a development of the substance of the law itself. The associations of civilized nations to suppress the slave trade both made and enforced a new law. The concert on the Eastern question, the Congress of Paris, the joint action of the Powers in the case of Greece and Crete, and in the settlement of the questions raised by the Russo-Turkish and Japanese wars, the Geneva and the Hague conventions, are all proofs of the increasing readiness of the Great Powers to make, declare, and enforce doctrines of law; and they have not hesitated, in case of need, to make their action binding upon weaker states, disregarding, for the good of the world, the technical theory of the equality of all states. While all independent states are still free, they are not now regarded as free to become a nuisance to the world. Perhaps the most striking change in the substance of international law has been the extraordinary development of the law of neutrality. A hundred years ago the rights and the obligations of neutrals were ill defined and little enforced. To-day they form a principal theme of discussion in every war, and the neutral nations, for the good of the whole world, force the belligerents to abate somewhat from their freedom of action.

It may be worth while, in order to see how far this constitutional change has progressed, to look for a moment at the present condition of the constitutional law of nations. We have a body of states known as the "Great Powers" which have assumed the regulation of the conduct of all nations. In this hemisphere the United States is sponsor for all the smaller independent nations. In Europe the Great Powers exercise control over the whole of Europe and Africa and a large part of Asia, while in the extreme Orient Japan seems likely to occupy a position similar to our own

in the western hemisphere. The constitutional position of this Confederation of Powers is not unlike that of the states of the American Confederation in 1780, and in certain ways it is even further developed. Its legislation is not in the hands of a single permanent congress, but it is accomplished by mutual consultation. For action, as Lord Salisbury once informed the world, "unanimous consent is required," as was the case in our Confederation. Executive power has been exercised several times, either by the joint show of force by two or more powers, or by deputing one power to accomplish the desired result. The judiciary, as a result of the Hague Convention, is much further developed than was that of the Confederation, even after 1781. All of this has been accomplished in fifty years, and the prospect of peace and prosperity for the whole world as a result of its further development is most promising.

The progress that has been described is well indicated by the course of the movement for codification.

Just a hundred years ago the first of the French Codes was adopted. These codes had two purposes: first, to unify the law which, before the adoption of the codes, had differed in every province and every commune of France; second, to simplify it so that every one might know the law. The first purpose appealed most strongly to lawyers and to statesmen. The second appealed to the people generally. Whatever reason weighed most with Napoleon, there is no doubt which made the codes permanent. The people of France, and of the other countries where they were introduced, hailed them as creating a law for the common people. They persisted in most countries where they had been introduced by Napoleon's arms in spite of the later change of government; whether the country on which they had been imposed was Flemish, German, Swiss, or Italian, it retained the codes after the defeat of Napoleon, and they have remained almost the sole relic of his rule, the only governmental affairs which retain his name, and, except Pan-Germanism, the only lasting monument of his labor. They persisted because they were in consonance with the individualistic feelings of the times.

Bentham urged codification on England for the same reason:

"That which we have need of (need we say it?) is a body of law, from the respective parts of which we may each of us, by reading them or hearing them read, learn, and on each occasion know, what are his rights, and what his duties."

The code, in his plan, was to make every man his own lawyer, and the spirit of individualism could go no further than that. Conservative England would not take the step which Bentham urged, but a code prepared by one of his disciples upon his principles was finally adopted (by belated action) in Dakota and California, and was acclaimed as doing away with the science of law and the need of lawyers.

The result of the adoption of the French Codes and the Benthamite Codes has been far from what was hoped and expected. They were to make the law certain and thus diminish litigation and avoid judge-made law. That litigation has not been diminished by codification can easily be shown by comparing the number of reported cases in the states which have adopted the codes, and in states which have not adopted them. As a result of this comparison, we find that France has over fifteen volumes a year of reports of decisions on points of law, four of them containing over 2500 cases each; England has about ten volumes a year of reports of decisions on points of law, containing in all about 900 cases. California has from three to four volumes of reports of decisions on points of law each year; 100 since the adoption of the code in 1871; Massachusetts has two to three volumes of reports of decisions on points of law, 76 in all during the same period. As bearing on the avoidance of judge-made law, which Bentham, by a curious ignorance one is perhaps not quite justified in calling insane, regarded as inferior to legislature-made law, the result of the codes in one or two points will be instructive. The French Code provided that all actions *ex delicto* should be decided by the court as questions of fact, without appeal for error of law. Notwithstanding this provision, recourse has been had to the Court of Cassation and a system of law has been built up on judicial decisions similar in character and comparable in amount to that built up in England in the same way during the same period. There is, for instance, a French law of libel which must be learned, not from the code but from the pages of Dalloz and the Pandectes Françaises, just as our law of libel must be studied in the law reports and the digests. Even if a point is apparently covered by an express provision of the code, judicial decisions may affix a meaning to the provision which can be known only to a student of law. Thus the French Code appears to lay down the proposition that capacity to contract is governed by the law of the party's nation, yet the French courts refuse to apply this principle, and instead of it apply

the French law of capacity in each case where the other party to the agreement is a Frenchman who acted *bona fide* or where the party to be bound was commorant and doing business in France. These are two examples only out of many that might be cited of the failure of the code to fulfill the hopes of its individualist sponsor. If we leave the French Code and come to those in our own country, we shall find the same process going on. The law of California has been developed in much the same way since the adoption of the code as before, and the common law decisions of other states are as freely cited by her courts as authority as if her own law had never been codified. The uncertainty and confusion caused by the adoption of the New York Civil Code of Procedure is a well-known scandal.

It is true that Bentham objected to the French Code as imperfect and made upon the wrong principle, and that Field objected to the New York Code of Civil Procedure as finally adopted. These objections were most characteristic. Every codifier desires not merely a code but his own code, and will not be satisfied with any other. Hence it follows that no complete code can be adopted which would be satisfactory to many experts in law. Furthermore, no codifier will be satisfied to accept the judgment of a court or any body of other men upon the meaning of his code, nor to accept the interpretation of the executive department on the proper execution of the law. It will follow that each codifier of the Benthamite type must be legislature, judge, and sheriff, and the logical result (like the logical result of all individualism carried to an extreme) is anarchy.

This failure of the hope of the individualistic codifiers and the change in the spirit of the age have affected our ideal of codification. The purpose of the modern codifiers is not to state the law completely, but to unify the law of a country which at present has many systems of law, or to state the law in a more artistic way. In other words, the spirit of the modern codifiers is not individualistic but centralizing. Thus the modern European codes of Italy, Spain, and Germany were adopted in countries where a number of different systems of law prevailed, and the purpose of codification in each state was principally to adopt one system of law for the whole country, and incidentally to make the expression of the law conform to the results of legal scholarship. The same purpose is at the basis of the American Commission for the Uniformity of Legislation. The purpose of the English codifiers appears to be

merely an artistic one. It cannot be better expressed than by the last great disciple of Bentham, Professor Holland. The law expressed in a code, he says, "has no greater pretensions to finality than when expressed in statutes and reported cases. Clearness, not finality, is the object of a code. It does not attempt impossibilities, for it is satisfied with presenting the law at the precise stage of elaboration at which it finds it; neither is it obstructively rigid, for deductions from the general to the particular and 'the competition of opposite analogies' are as available for the decision of new cases under a code, as under any other form in which the law may be embodied. . . . It defines the terminus *a quo*, the general principle from which all legal arguments must start. . . . The task to which Bentham devoted the best powers of his intellect has still to be commenced. The form in which our law is expressed remains just what it was."

Such a code as he describes is really very far from the ideal of Bentham. It does not do away with judge-made law; it does not enable the individual to know the law for himself; its only claim is that it facilitates the acquisition of knowledge by the lawyer by placing his material for study in a more orderly and logical form. The cherished ideals of the reformers of a hundred years ago have been abandoned, and an ideal has been substituted which is quite in accordance with the spirit of our own times.

The most striking characteristic of the progress of jurisprudence in the first half of the century was its increasing recognition of individual rights and protection of individuals. Humanity was the watchword of legislation; liberty was its fetich. Slavery was abolished, married women were emancipated from the control of their husbands, the head of the family was deprived of many of his arbitrary powers, and the rights of dependent individuals were carefully guarded. In the administration of criminal law this is seen notably. At the beginning of the century torture prevailed in every country, outside of the jurisdiction of the common law and the French Codes, but torture was abolished in every civilized state during this period. Many crimes at the beginning of the century were punishable with death. Few remained so punishable at the end of fifty years. The accused acquired in reality the rights of an innocent person until he was found guilty. He could testify, he could employ counsel and could be informed of the charge against him in language that he was able to understand; and, even after conviction, his punishment was inflicted in accord-

ance with the dictates of humanity. Imprisonment for debt was abolished. Bankruptcy was treated as a misfortune, not a crime.

As with the emancipation of individuals, so it was with the emancipation of states. The spirit of the times favored the freedom of the oppressed nations as well as of individual slaves. The whole civilized world helped the Greeks gain their independence. The American people hailed with touching unanimity the struggles of Poland and of Hungary for freedom, and even the black republics of the West Indies were loved for their name, though they had no other admirable qualities.

While there has been little actual reaction in the last half-century against this earlier development of the law in the direction of liberty, there have been few further steps in that direction. The zeal for emancipation has in fact spent its force, because freedom, quite as great as is consistent with the present state of civilization, has already been obtained. So far as there has been any change of sentiment and of law in the last generation, it has been in the direction of disregarding or of limiting rights newly acquired in the earlier period. France, which secured the freedom of Italy, threatens the independence of Siam; England, which was foremost in the emancipation of the slaves, introduces coolie labor into the mines of South Africa; America, which clamored for an immediate recognition of the independence of Hungary, finds objectors to recognizing the independence of Panama and refuses independence to the Philippines. In the criminal law there has been no reform, though there has been much improvement, since 1850. Married women have obtained few further rights, principally because there were few left for them to acquire, and, while we have freed our slaves, we have encouraged trade unionism. In short, the humanitarian movement of two generations ago which profoundly affected the law of the civilized world for fifty years has ceased to influence the course of jurisprudence.

The most characteristic development of the law during the last fifty years has been in the direction of business combination and association. A few great trading companies had existed in the middle ages; the Hanse merchants, the Italian, Dutch, and English companies wielded great power. They were exceptional organizations, and almost all had ceased to act by 1860. The modern form of business association, the private corporation with limited liability, is a recent invention. Such corporations were created by special action, by sovereign or legislature, in small

though increasing numbers all through the last century; but during the last generation every civilized country has provided general laws under which they might be formed by mere agreement of the individuals associated. Now the anonymous societies of the Continent, the joint-stock companies of England and her colonies, and the corporations of the United States, all different forms of the limited liability association for business, have engrossed the important industries of the world. Different countries are competing for the privilege of endowing these associations with legal existence. Corporations are formed in one state to act in all other states or in some one other state, or (it may be) anywhere in the world except in the state which gave them being; and so in the last fifty years an elaborate law of foreign corporations has grown up all over the civilized world. But the corporation is only one form of business combination which has become important. Greater combinations of capital have been formed, that is, the so-called trusts; great combinations of laboring men have been formed, the so-called unions; and the enormous power wielded by such combinations has been exercised through monopolies, strikes, and boycotts. All these combinations have been formed under the law as it has been developed and all are legal. Furthermore, the great business operations have come to depend more and more upon facilities for transportation, and great railroads and other common carriers have come to be equal factors with the trusts and the unions in the operations of modern business. The first effect, then, of the ideas of the present age upon the law is its development in the direction of forming great commercial associations into legal entities wielding enormous commercial power.

If such associations had been formed seventy-five years ago, the spirit of the age would have left them free to act as they pleased. Freedom from restraint being the spirit of the times, it would have been thought unwise to restrain that freedom in the case of a powerful monopoly as much as in the case of a poor slave. But at the present time we are more anxious for the public welfare than for the welfare of any individual, even of so powerful a one as a labor union or trust, and in accordance with the genius of our age the law has developed and is now developing in the direction of restraint upon the freedom of action of these great combinations, so far as such restraint is necessary to serve the public interest. For centuries innkeepers and carriers have been subject to such

restraint, though little control was in fact exercised until within the last fifty years. To-day the law not only requires every public service company to refrain from discrimination and from aggrandizing itself at the expense of the public, but the trusts and the unions also are similarly restricted. The principle of freedom of action, the courts in all questions now agree, rests upon the doctrine that the interests of the public are best subserved thereby, and applies only so far as that is true. When freedom of action is injurious to the public it not only may be, but it must be, restrained in the public interest. That is the spirit of our age, and that is the present position of the law when face to face with combinations such as have been created in the last generation. An interesting example of restriction is that almost universally placed upon foreign corporations. In the competition of certain states for the privilege of issuing charters, great powers have been conferred, which were regarded as against the public policy of the states in which the corporations desired to act. Strict regulations for the action of such corporations have resulted, imposed in the European countries usually by treaty, in England and America by statute.

A summary of the history of jurisprudence in the last hundred years would be incomplete without a consideration of legal scholarship during the period and of the results of the scientific study of law. The reformers of a hundred years ago were profoundly indifferent to the history of law. Bentham, the founder of so-called analytic jurisprudence, wished not to understand the existing law, but to abolish it root and branch, and to build a new system, the principles of which should be arrived at merely by deductive reasoning. It seems to us now almost impossible that such a man should have believed himself more capable of framing a practicable and just system of law than all his wise predecessors, but Bentham was a marvel of egotism and self-conceit, and his reasoning powers were far from sound. He seems to have been incapable of understanding the nature of law. "If," he said, "we ask who it is that the Common Law has been made by, we learn to our inexpressible surprise, that it has been made by nobody; that it is not made by King, Lords, and Commons, nor by anybody else; that the words of it are not to be found anywhere; that, in short, it has no existence; it is a mere fiction; and that to speak of it as having any existence is what no man can do, without giving currency to an imposture." Employing the same reasoning, he would have concluded that justice, not being made by King, Lords, or Commons,

nor by anybody else, had no existence; that truth, since the words of it are not to be found anywhere, is a mere fiction. But these defects are too often found in reformers. The humanitarian age brought enormous benefits to the world, but its ideas were often ignorant, crude, and impracticable, and needed to be modified by the better instructed minds of the present constructive age. While Bentham was at the height of his power, the Historical School of Jurists in Germany was beginning its great work. Savigny was already preaching the necessity of understanding the history of law before it was reformed. Mittermaier and Brunner were to follow and carry on the work of the master. The unity of the past and present, and the need of conforming the law of a people to its needs were among their fundamental principles. Bentham had said, "if a foreigner can make a better code than an Englishman we should adopt it." Savigny said, with greater truth and knowledge of human nature, that no system of law, however theoretically good, could be successfully imposed upon a people which had not by its past experience become prepared for it.

The impulse given to legal study by the work of Savigny and his school has in the last generation spread over the civilized world and profoundly influenced its legal thought. The Italians, the natural lawyers of the world, have increased their power by adopting his principles. In England a small but important school of legal thinkers have followed the historical method, and in the United States it has obtained a powerful hold. The spirit of the age, here too, has supported it. We are living in an age of scientific scholarship. We have abandoned the subjective and deductive philosophy of the middle ages, and we learn from scientific observation and from historical discovery. The newly accepted principles of observation and induction, applied to the law, have given us a generation of legal scholars for the first time since the modern world began, and the work of these scholars has at last made possible the intelligent statement of the principles of law.

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